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FARM CREDIT ADMINISTRATION
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SUMMARY OF CASES

RELATING TO

FARMERS ' COOPERATIVE ASSOCIATIONS

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For the

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Nonprofit Associations

Chapter 230 of the Code of Iowa for 1939 provides that the State tax commission of Iowa shall determine the actual value, for the purpose of taxation, of all electric transmission lines of companies, defined by Section 7089 as those owning or operating such lines within the State and wholly or partly outside cities and towns, "except cooperative corporations or associations which are not organized or operated for profit." (Underscoring added.)

The State tax commission of Iowa attempted to assess the property of certain rural electric cooperative associations and these associations obtained an injunction preventing the commission from assessing such taxes. On appeal, the judgment of the lower court was affirmed (Greene County Rural Electric Co-Operative v. Nelson, 12 N.W. 2d 886).

The electric cooperatives asserted that they were exempt from the payment of taxes on the ground that they were "not organized or operated for profit" and thus were specifically excepted from the terms of the tax statute. On appeal, the case was disposed of on the basis of a stipulation of facts. Among other things, the electric cooperatives stipulated regarding their operations as follows:

> "It is further stipulated and agreed by the parties hereto that the facts are, which shall be considered as the evidence in this case, that in the operation of the business of the plaintiffs in this case, and cooperative associations similarly situated, each member holds one membership only, that is by a certificate of membership, has only one vote in the management of the business of the plaintiffs, and cooperative associations similarly situated; that all members are required to be patrons and business is done with the members only; that no dividends or interest has ever been paid by the plaintiffs or other cooperative associations similarly situated to members on the membership or the issuing price thereof; that the earnings or excess charges are distributable to the members only on a patronage basis in proportion to the business done by the members through the cooperative corporation and other corporations similarly situated."

The court made the following comment, based upon the foregoing stipulation of facts:

> "The articles of incorporation are consistent with the method of operation above set forth. We are satisfied that plaintiffs are not organized or operated for profit. There is no return on capital invested and can be none. The membership fee of $2.50 is nominal and nothing more than a deposit to establish credit, such as many public utilities require of their patrons. The income is that received for business done with members. Only members are dealt with. Any net earnings are returned on the basis, not of membership or investment, but of business done. It is literally no more than

a return of an overcharge originally assessed to provide a margin of safety in the operation of the business. Cooperative corporations and associations so organized and operated have been recognized repeatedly as being not operated for profit."

The court further said:

"In Hanna on 'The Law of Cooperative Marketing Associations', page 50, it is stated: 'The essential idea in the term "non-profit" is clearly that such corporations are not designed primarily to pay dividends on invested capital but to provide a system and method by which the member can effect the sale of his products.'

"In 'The Law of Cooperative Marketing', by Evans and Stokdyk, page 3, it is stated: 'The basic legal and economic principles of the cooperative scheme are limitation upon the voting power and restrictions upon alienation of voting stock or membership interests, thus preserving the dispersion of control and keeping the control within the class affected; limiting the use of proxies, thus fixing the responsibility upon the cooperators; the limitation of earnings upon invested capital, thus insuring the non-profit character of the scheme; and the distribution of earnings or savings upon a patronage basis, that is, according to the quantity or value of products marketed through the association by the respective members.'

"In 90 Univ. of Pa. Law Review, page 151, it is stated: 'A fundamental principle applicable to all cooperatives is the avoidance in the organization of entrepreneur profit. Patronage refunds, therefore, are not to be considered as a division of the profits. They are rather a return of the over-charge.'"

Although the property of the rural electric cooperatives was exempt from the payment of taxes on the ground that the cooperatives were "not organized or operated for profit," Section 7102 of the Iowa Code provided a method by which the value of the interests of members in such electric cooperative corporations or associations was to be deemed real estate for purposes of taxation. The section reads as follows:

"Interest of cooperative members. The value of the interests of members in such cooperative corporations or associations which are not organized or operated for profit shall, for the purpose of taxation, be deemed real estate, and be assessed as part of the real estate served by such transmission line or lines."

In the case under discussion the statute did not define what was meant by an association "not organized or operated for profit," and the court had to determine the meaning of this term on the basis of the general law applicable to the facts.

If an association is formed and operated in accordance with a statute which provides in effect that associations formed thereunder are non-profit, then it would appear clear that so far as that statute is

concerned such an association is a nonprofit association (Mutual Orange Distributors v. Black, 221 Mo. App. 493, 287 S.W. 846; Georgia Milk Producers Confederation v. City of Atlanta, 185 Ga. 192, 194 S.E. 181). In instances of this character an association is a nonprofit association by statutory definition, and such a definition, of course, need not meet the definition of a nonprofit association from an economic standpoint.

In the absence of a statutory definition of what was meant by an association "not organized or operated for profit," the court in the instant case concluded, on the basis of the facts covering the organization and operation of the association, that it was such an association. As will be observed from the quotations from the opinion, the court laid some emphasis on the fact that no provision was made for the payment of dividends and said, "There is no return on capital invested and can be none." The fact that a corporation has been formed for purposes other than the payment of dividends on stock, has been recognized as distinguishing a nonprofit corporation from one formed for pecuniary gain.

In the case of Read v. Tidewater Coal Exchange, 13 Del. Ch. 195, 116 A. 898, the court said:

> "Whether dividends are expected to be paid may, generally speaking, be taken as the test by which we are to determine whether, or not, a given corporation is organized for profit. Perhaps a better way to put it would be to say that a corporation is for profit when its purpose is, whether dividends are intended to be declared or not, to make a profit on the business it does which in reason belongs to it and which if its affairs are administered in good faith would be available for dividends. Subterfuges by which a corporation allowed its profits to be diverted to those owning it, though not in the form of dividends, would manifestly not remove from the corporation its feature of profit making. Nor would a mere declaration in its certificate of incorporation that it was organized not for profit, be sufficient to stamp upon it a nonprofit character. In each case, when the corporation is examined, the true facts must be ascertained and the corporation judged accordingly, no matter what its scheme of operation, or its pretensions may be. Such being true, the state is always protected against schemes to evade franchise taxes, first by the inspection which the corporation must undergo before the Secretary of State, and secondly by the writ of quo warranto which the state may always employ to oust a corporation for abuse of its franchise."

In Coulumbe v. Eastman, 76 N.H. 248, 81 A. 704, it was held that a corporation was not formed for profit and that the dividends which it paid on stock, in view of all of the facts, was "more like a payment of interest than a dividend." A like conclusion was reached in Garden Homes Company v. Commissioner of Internal Revenue, 64, F. 2d 593.

If an association is operating under organization papers which positively obligate the association to return to its patrons all amounts over and above operating costs and expenses (other than sums borrowed or received

as capital) as promptly as possible after the close of its fiscal year, it would be clear that the association would have no net profits at least, from its operations, and would have no income taxes to pay as long as such taxes are based on net profits (see Air-Way Electric Appliance Corporation v. Guitteau, 123 F. 2d 20).

On the other hand, in a number of cases involving nonprofit associations, it has been held that the fact that the associations were incorporated as nonprofit associations did not relieve them from liability for income taxes. (See Apartment Operators Association v. Commissioner of Internal Revenue, 46 B.T.A. 229, affirmed in 136 F. 2d 435; Underwriters' Laboratories v. Commissioner of Internal Revenue, 135 F. 2d 371; and West Penn Beneficial Ass'n. v. United States, 44 F. Supp. 575, discussed in Summary No. 20, page 1.)

In this connection it should be remembered that liability for Federal income taxes depends on whether income has been received. Whether income has been received is a question of law and fact. Of course Congress cannot make taxable income out of what is not income (Nicholas v. Fifteenth Street Co., 105 F. 2d 289), but on the other hand if income has been received, the recipient, unless exempt, may be required to pay income taxes thereon (see White v. United States, 305 U.S. 281).

At least from the standpoint of income taxes, it appears clear that the fact that a corporation is not organized to pay dividends and has no provisions in its organization papers for doing so, is not determinative of the question of whether it is operating without taxable income (Produce Exchange Stock Clearing Ass'n. v. Helvering, 71 F. 2d 142).

In the case of Northwestern Jobbers' Credit Bureau v. Commissioner of Internal Revenue, 37 F. 2d 880, in which the organization was held liable for income taxes, it was said (page 883):

> "It is true that no dividend has been paid directly in money or property, but the shareholders have received very substantial assistance by the use made of the surplus by the appellant. One of the definitions given by Webster's International dictionary of the word 'inure' is 'to serve to the use or benefit' (see, also, Salyer v. Jackson, 105 Okl. 212, 232 P. 412), and a profit can result to the stockholders in other ways than dividends (Houston Belt & Terminal Ry. Co. v. United States [C.C.A.] 250 F. 1)."

Committee Reports on Tax Bills

Cumulative Bulletin 1939-1 (Part 2) issued by the Bureau of Internal Revenue, contains the committee reports on all of the revenue bills from 1913 through 1938. It is a volume of 899 pages and may be obtained from the United States Government Printing Office, Washington, D. C., for $1.00.

These committee reports shed some light on the exemption of agricultural cooperative associations from the payment of Federal income taxes.

Unemployment Compensation Acts - Agricultural Cooperative Associations

The Utah Industrial Commission fixed contributions to be paid by the Cache Valley Turkey Growers Association under the Unemployment Compensation Act of Utah on wages which it paid to its employees. The Association then instituted an original proceeding in the Supreme Court of Utah, which annulled the order of the Commission and remanded the case (Cache Valley Turkey Growers Ass'n v. Industrial Com'n, 144 P. 2d 537).

From the opinion of the Supreme Court of Utah it appeared that:

> "Plaintiff was organized in 1942 as a nonprofit mutual corporation, for the purpose of processing and preparing for market the turkeys of the association. It is conceded that there is no market for the turkeys until they have been processed, and that processing of large flocks on farms of the individuals is not practicable unless the farmer has the equipment necessary to do the job in the same way as it is done by the processing plants, because large numbers of birds must be moved in a day or two because of market demands; and that such equipment is too expensive for each farmer to purchase. Plaintiff's plant was completed in 1942, and processed birds that year. At the conclusion of the operation of the plant for the year, the Industrial Commission fixed contributions to be paid by plaintiff to the unemployment compensation fund, based on wages paid by plaintiff during the operating period."

The Association took the position that it was exempt from the Unemployment Compensation Act of Utah on the wages paid by it to its employees because its employees were engaged in performing agricultural labor. Subsection (j) (6) of 42--2a--19 of that Act provides:

> "The term 'employment' shall not include: *** (D) Agricultural labor (as defined in paragraph (8) of this subsection)."

Subsection (8) of the section provides:

> "'Agricultural labor.' The term 'agricultural labor' includes all services performed--***
>
> "(D) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption." (Underscoring added.)

The Industrial Commission argued that the underscored words, reading "but only if such service is performed as an incident to ordinary farming operations", did not cover persons employed in a plant like that operated by the Association, but urged that such activities were commercial in nature. The court said in part:

> "The Utah statute, as far as the scope or definition of 'employment' within the act is concerned, was an exact copy of the Federal Act. As enacted in 1936, Sp.Sess. c. 1, Laws 1936, and amended in 1937, Laws 1937, c. 43, it excepted from the provisions of the act, 'agricultural labor.' Under this provision considerable difficulty was experienced by the Federal agencies in administration of the act, and the courts were not agreed as to what the term included. Thus the Washington court in Cowiche Growers, Inc., v. Bates, 10 Wash.2d 585, 117 P.2d 624, 628, held, pursuant to a regulation of the unemployment commissioner, that the work must be done 'on a farm' to constitute agricultural labor. And in Great Western Mushroom v. Industrial Comm., 103 Colo. 39, 82 P.2d 751, the court held that growing mushrooms was not agricultural labor, because the commission had enacted a regulation or definition of 'agricultural labor' limiting it to work performed by an employee of the owner of a farm or a tenant of the farm on which the articles were grown. The same court for the same reason held that the growing of flowers by a floral company was not 'agricultural labor.' Park Floral Co. v. Industrial Comm., 104 Colo. 350, 91 P.2d 492. In Connecticut the court upheld a board regulation declaring that the term 'agricultural labor' did not include work which had formerly been done on a farm, but which had now become somewhat specialized and was not done on the farm. H. Duys & Co. v. Tone, 125 Conn. 300, 5 A.2d 23. And different tests were applied by different courts and commissions to determine if a certain type of labor was agricultural. Some states applied the test of location of the work; some the element of profit; some the nature of the product. Yakima Fruit Growers' Ass'n v. Henneford, supra; Peterson v. State Industrial Acc. Comm., 140 Or. 326, 12 P.2d 564. General confusion and administrative difficulties were the results. Because of such considerations the Congress passed an amendment to the Federal Act in 1939, 42 U.S.C.A. § 409(l) [ell], to define 'agricultural labor' and clarify the scope of the exemption. In 1941 our own legislature amended the Utah act, Laws 1941, c. 40, which had theretofore exempted 'agricultural labor' to define that term in the exact language of the Federal amendment.
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> *********
>
> "If the killing, dressing, cooling and grading of the farmers' turkeys done at the co-operative plant is an 'incident to ordinary farming operations' it is concededly agricultural labor. This phrase is not itself as clear as might be desired, but we are not wholly without aid as to its meaning. The federal amending act was passed pursuant to a report of a congressional committee defining it. The meaning and definition of the phrase 'as an incident to ordinary farming operations' is given in Senate and House Committee Reports

76th Congress 1st Session, House Report No. 728, p. 53, Senate Report No. 734, p. 63. We quote from the latter report:

"'The expression "as an incident to ordinary farming operations" is, in general, intended to cover all services of the character described in the paragraph which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such organization or group. The expression also includes the delivery of such commodity to the place where, in the ordinary and natural course of the particular kind of farming operations involved, the commodity accumulates in storage for distribution into the usual channels of commerce and consumption. To the extent that such farmers, organizations, or groups, engage in the handling, etc. of commodities other than those of their own production or that of their members, such handling, etc., is not regarded as being carried on "as an incident to ordinary farming operations." In such a case the rules set forth in subsection (c) of this section apply.

"'In the case of fruits and vegetables, however, whether or not of a perishable nature, services performed in the handling, drying, packing, etc., of those commodities constitute "agricultural labor" even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of such fruits or vegetables for market. Under this portion of the paragraph, for example, services performed in the sorting, grading, or storing of fruits or in the cleaning of beans, as an incident to their preparation for market will be excepted irrespective of whether performed in the employee of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

"'Since the services referred to in this paragraph must be rendered in the actual handling, drying, etc., of the commodity, the paragraph does not exempt services performed by stenographers, bookkeepers, clerks, and other office employees in the employ of farmers, farmers' cooperative organizations or groups, or commercial handlers. To the extent that services of this character are performed in the employ of the owner or tenant of a farm, however, and are rendered in major part on a farm, they may be exempt under the provisions of paragraph (2).' (Italics added)

"The federal act thus using the expression as so defined in the committee report which introduced and sponsored the amendment passed August 10, 1939, and became effective January 1, 1940. At the first legislative session thereafter, the Utah act was amended to adopt the language of the amended federal act, March 24, 1941, effective July 1, 1941. It seems clear the legislative intent in amending the act to define 'agricultural labor' in the language of the amended federal definition was to make the Utah act conform and adopt the definition and meaning of the language employed as stated by the congressional committee, which originated and formulated the definitions."

In the case of Employment Security Commission et al. v. Arizona Citrus Growers, decided by the Supreme Court of Arizona, 144 P. 2d 682, the question was presented of whether employees of the Association were engaged in agricultural labor and therefore exempt from coverage under the Unemployment Compensation Law of that State. The court held that the employees of the Association were not engaged in performing agricultural labor within the meaning of that law and the regulations of the Commission issued thereunder, for a period of time prior to June 16, 1941. On that date the State of Arizona amended its Unemployment Compensation Law so as to make it conform with the Federal Social Security Act of 1935 as amended on August 10, 1939.

After the date of the amendment to the Arizona Unemployment Compensation Law - namely, June 16, 1941 - covering the definition of agricultural labor, it was agreed that "there is no liability on the part of the Association for payment of contributions on wages of these claimants, or others similarly employed, to the unemployment compensation fund." The Supreme Court of Arizona refused to adopt the view that the amendment of its Unemployment Compensation Law made on that date should be given a retroactive meaning, but held that it should have a prospective operation only.

In the last case just discussed, all of the patrons of the cooperative were members, and in the first case discussed above, all of the patrons were members or persons who had "made application for membership in the cooperative." Particular attention is called to the following quotation from Senate Report No. 734 on the bill, which, when enacted in 1939, amended the definition of agricultural labor:

> "To the extent that such farmers, organizations, or groups, engage in the handling, etc. of commodities other than those of their own production or that of their members, such handling, etc., is not regarded as being carried on 'as an incident to ordinary farming operations.' In such a case the rules set forth in subsection (c) of this section apply."

In view of the foregoing, it is not unlikely that a court would hold that the employees of a cooperative that are engaged in the handling of agricultural commodities at its processing plant are not performing agricultural labor within the meaning of the statute if the cooperative is handling commodities which it did not produce or which were not produced by its members.

In the case of In Re Yakima Fruit Growers Association (Wash.) 146 P. 2d 800, the Supreme Court of Washington passed upon the meaning of the term "agricultural labor" as that term was employed in the Unemployment Compensation Act of that State. During the period for which assessments were made against the cooperative for the Unemployment Compensation Fund, the Unemployment Compensation Act of Washington provided that the term "employment" should not include -

> "(i) Agricultural labor; (services customarily performed by a farm hand on a farm for the owner or tenant of a farm)."

The court, following the earlier case of Cowiche Growers, Inc. v. Bates, 10 Wash. 2d 585, 117 P. 2d 624, held that the work done by employees of the cooperative association in receiving, washing, grading, sizing, boxing, labeling, storing, and loadung farm commodities in a packing house and warehouse owned by the association but not located upon a farm, did not constitute agricultural labor within the meaning of the statute.

The Unemployment Compensation Act of Washington was amended in 1941 so as to broaden the meaning of the term "agricultural labor." As amended, the term was defined as including -

> "all services performed:
>
> "(1) On a farm, in the employ of any person, in connection with the cultivating of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wild life, or in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment.
>
> "(2) In handling, planting, packing, packaging, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, in their raw and natural state, as an incident to the preparation of such fruits and vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution or consumption."

Apparently it was accepted that the employees concerned, under the statute as amended, would be engaged in performing agricultural labor.

The court in its opinion refers to an earlier case (Hansen Brothers Dairy v. Riley (Wash.) 137 P. 2d 512, 146 A.L.R. 1302) which arose after the statute of Washington had been amended as just outlined, in which the court held that the employees of farmers engaged in the operation of dairy farms, and which employees, among other things, engaged in the distribution of milk to consumers and also distributed some commodities which were not raised by the farmers, were engaged in the performing of agricultural labor.

See also Summary No. 2, page 3; Summary No. 8, page 5; Summary No. 10, page 1; Summary No. 18, page 26; and Summary No. 21, page 11.

Liability for Discharge by Cessation of Business

In the case of Gaspar v. United Milk Producers of California (Cal. App.) 144 P. 2d 867, it appeared that the United Milk Producers of California had entered into a contract with one M. Gaspar, who at the time was the president of Dariglen Creameries, Ltd., under which the cooperative -

> "agreed to purchase from plaintiff, at a minimum price of $10 per share, not to exceed 413 shares of the capital stock of Dariglen Creameries, Ltd., in the event plaintiff within seven years shall 'be discharged from those duties which he is now performing for said corporation, save and except his duties now performed by him as president of said corporation or as an official thereof.'"

Later, the United Milk Producers of California, through the purchase of stock in Dariglen Creameries, Ltd., and otherwise, obtained control of that corporation, which was operating at a loss; and

> "all of the assets and property, including business and good will, of Dariglen Creameries, Ltd., were transferred to defendant and defendant assumed all of its liabilities. This transfer was effected on July 26, 1940. On August 1,1940, defendant in turn sold and transferred to The Borden Company the trade routes, business, good-will and certain of the physical assets of Dariglen Creameries. Ltd., and from that date the operation of any business at the plant of Dariglen Creameries, Ltd., was completely discontinued."

On the discontinuance of the business of Dariglen Creameries, Ltd., M. Gaspar tendered the stock in that company owned by him amounting to 413 shares, to the cooperative and demanded payment therefor in the amount of $4,130. The demand was refused and a suit was then successfully maintained on the theory that the cooperative had agreed to buy the 413 shares of stock at $10 per share in the event that M. Gaspar was "discharged from those duties which he is now performing for said corporation, save and except his duties now performed by him as president of said corporation or as an official thereof."

In other words, M. Gaspar successfully contended that when the business of Dariglen Creameries, Ltd., was discontinued, this per se operated as a discharge.

On appeal by the cooperative it contended "that to constitute a discharge from employment 'there must be unequivocal statements by an authorized person to that effect.'"

In this connection the court said:

> "On July 26, 1940, Dariglen Creameries, Ltd., having transferred all of its assets including its business to defendant, had thereby not only put it entirely out of its power to employ plaintiff further to perform any of the duties which he had theretofore performed for it in its business, but because of the transfer of all

of its assets it was also no longer in a position to pay him his agreed salary. It is difficult to imagine how any mere statement of discharge, however unequivocal, could have made the termination of his employment any more complete.

"In 1 Labatt's Master and Servant, 2d Ed., sec. 187c(4), pp. 589, 590, it is stated that a servant is dismissed: 'Where the master by some positive act rendered it impossible for the servant to accomplish the stipulated work. The most numerous and important examples of this situation are furnished by the cases which involve a discontinuance of business by the master.'

"In the same work, Vol. 1, sec. 262b, p. 795, we find the following: 'It is fully settled that a servant engaged for a definite term, to perform duties with relation to a certain business, is entitled to maintain an action for wrongful dismissal against his master, if the fulfilment of the contract is rendered impossible by the discontinuance of the business before the expiration of the stipulated term.'

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"No California case which we have found announces a rule contrary to the rule generally recognized that where an employer puts out of his power the further performance of an employment contract by selling his entire business it operates as a discharge of his employee engaged in such business. On the contrary, this rule is recognized in Langenberg v. Guy, supra, 77 Cal. App. 664, 247 P. 621, and Armstrong v. Cherry, supra, 89 Cal. App. 442, 264 P. 798, although on their facts the courts held that it was not applicable in the cases before them."

Agricultural Labor - Fair Labor Standards Act

In Holt v. Barnesville Farmers Elevator Co., 52 F. Supp. 468, it appeared that a suit was instituted against the elevator company to recover overtime wages under the Fair Labor Standards Act. Section 13 (a)(10) of that Act (29 U.S.C.A. Sec. 213(a)(10)) provides:

"(a) The provisions of sections 206 and 207 (sections 6 and 7) of this title shall not apply with respect *** (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, *** preparing in their raw or natural state, *** agricultural or horticultural commodities for market ***."

The employees concerned had been employed by the elevator company in the preparation of grain for market, and the court said:

"There seems little doubt that the plaintiffs were engaged in 'handling, storing, preparing in their raw or natural state, *** agricultural or horticultural commodities for market.'"

The Administrator of the Fair Labor Standards Act had issued interpretations of the statutory language in question, and the court in this connection said:

> "Plaintiffs prepared the grain for market in its raw or natural state; that is, they cleaned and graded it. Consequently, it seems evident that, according to the Administrator's interpretation of the terms in question, plaintiffs performed duties which exempt them from the Act's protection if they performed these duties in the area of production, as defined by the Administrator. The Administrator's interpretations seem natural and reasonable. No good reason is urged why the Court should not accept and adopt them for this case."

The court therefore held that the employees were exempt from the terms of the Fair Labor Standards Act if they performed their duties in the area of production as defined by the Administrator. During the period of time covered by the suit the Administrator had given three definitions of the term "area of production." The first definition required that the commodities come from the "immediate locality" of the establishment, the second and third definitions require that the commodities come from within the "general vicinity" of the establishment. The first and second definitions require that not more than seven employees be employed by the establishment; the third definition raises that number to ten.

It appeared that the most of the grain handled by the elevator was delivered to it each year from within fifteen miles, and no grain was delivered to the elevator from a greater distance than twenty-five miles. The court, in view of the facts involved, particularly stressing the good roads leading to the elevator, held that all of the grain was delivered to the elevator from the immediate locality and from the general vicinity of the elevator.

It was held that the Administrator was not authorized to include in his definition of area of production, a limitation on the number of employees which an employer might have. In this connection the court said in part:

> "Moreover, defendant claims that its employing more than seven persons during the three weeks mentioned is irrelevant because the Administrator lacked authority to define 'area of production' in terms requiring not more than a designated number of employees to be employed. This argument seems to have merit, for Congress authorized the Administrator to define 'area of production'. See Section 13 (a) (10). 'Area' relates to space. 'Production' of agricultural and horticultural commodities relates to the growing of such commodities. See Webster's New International Dictionary. Consequently, it follows that when Congress empowered the Administrator to define the 'area of production', it empowered him to define a geographical area. The Administrator, however, declared in effect that an employee is not employed in the given area unless the establishment

which employs him does not employ more than the number which the Administrator designates. The mere statement of the power which Congress gave the Administrator and what the Administrator has done shows that the Administrator has exceeded his authority.

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"There is nothing in the legislative history in the Senate or House proceedings which reflects any intention of the legislative body to give the Administrator the power which is now questioned."

See also Holly Hill Fruit Products v. Addison, 136 F. 2d 323; Remington v. Shaw, 52 F. Supp. 465; and Fleming v. Farmers Peanut Company, 128 F. 2d 440, discussed in Summary No. 16, page 16, in all of which conclusions were reached similar to those reached in the case discussed above.

Assessments Against Milk Dealers Held Invalid

In an unreported oral opinion in the case of William A. Warehime, et al., Plaintiffs v. H. H. Varney, et al., Defendants (No. 22156), given on April 3, 1944, by Hon. Paul Jones, District Judge for the Northern District of Ohio, he passed upon the validity of provisions in Orders Nos. 79 and 79-3 issued by the War Food Administration for assessments to be paid by milk handlers or dealers, and held that the assessment provisions in the Orders were invalid.

In this connection Judge Jones said in part:

"These provisions certainly present a novel departure from established practice in Constitutional government, and as well in respect of other like agencies for the control of food and prices. This is not to say that any effort to make agencies of the Government self-sustaining is to be judicially discouraged, but the mandate for exacting financial levies from the citizen is one Constitutionally committed to the Congress, and it is gravely to be doubted whether Congress could delegate such power, although in this situation it has not done or attempted to do so.

"If the War Foods Administration has the power to levy an assessment for the cost of supervising the milk handlers or dealers, there would seem to be no limitation upon the power of any of the numerous Government agencies and administrators to impose such financial burden upon any group by the simple expedient of a regulation or a directive. In my view, this question turns upon the authority and power of the War Foods Administrator, by regulation or order, validly to assess the milk dealers for their proportionate share of the cost and expense of maintaining the supervision provided by the regulations.

"There is nothing in the War Powers Act which grants to the President, or any agency set up by him, the power to assess the milk dealers any amount; nor is there anything in the War Powers Act

that by the slightest implication endeavors to grant such power. Such unlimited power in an agency or administrator, if permitted to levy an assessment for costs and expenses of administration, as in this case, would be destructive of Constitutional government.

"It is my considered judgment that the provisions of the orders in respect of the levying of an assessment, and the requiring of its payment, are without Constitutional or statutory authority, and their enforcement will be enjoined.

"Reference is made to the case of Stark vs. Wickard, Secretary of Agriculture, decided by the Supreme Court on February 28, 1944, which I think justifies and supports the action here taken; also, reference is made to the case of Thomas O'Neal vs. United States of America, decided by the United States Circuit Court of Appeals for the Sixth Circuit, February 11, 1944, wherein the question of limitation upon the powers of the President and agencies under his authority is discussed."

It is expected that an appeal will be taken in this case.

Independent Contractors - Social Security Taxes

In the case of Glenn v. Beard, 141 F. 2d 376, suit was successfully brought for the recovery of social security taxes alleged to have been erroneously collected. In disposing of the case the court said in part:

"In a case concerned with similar homeworkers, this court recently held that they were covered by the provisions of the Fair Labor Standards Act, 29 U.S.C.A. § 208 [Walling v. American Needlecrafts, Inc., 6 Cir., 139 F.2d 60], and appellant relies upon that decision as determinative of the question before us. In the Needlecrafts case, however, the controlling factor was the broad statutory definition of employ. '"Employ" includes to suffer or permit to work.' 29 U.S.C.A. § 203(g). It was held in the case above referred to that, from the legislative history of the statute in question, and of the subsequently proposed and rejected amendments thereto, there was evinced the intention of Congress, for the purposes of fair labor standards, to treat homeworkers as any other type of employee. The fact that such workers may be independent contractors does not, of itself, exclude them from the application of the Fair Labor Standards Act; they are embraced in the classification of employees, within the intendment of that statute, if they are suffered or permitted to work. But there is no such definition or provision relating to employment or employees in the Social Security Act. Without such monition, looking to the treatment of homeworking independent contractors as employees, for a special purpose, we conclude that the homework in this case is not included within that service performed by an 'employee for his employer,' which is the statutory criterion for application of the provisions

of the Social Security Act. Section 907(c), 26 U.S.C.A. Int. Rev. Code § 1607(c). Employment under this statute is to be understood in its ordinary sense, as meaning the legal relationship of employer and employee ***. '*** Individuals performing services as independent contractors are not employees.'".

Cooperatives - OPA Price Ceilings

The opinion of the Federal District Court for the Western Division of New York in the case of Bowles v. Co-operative G. L. F. Farm Products, 53 F. Supp. 413, follows:

"Suit has been brought by the plaintiff to enjoin the defendant from violating the provisions of the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix § 901 et seq. The plaintiff now makes application for an order pendente lite restraining defendant from the violation of the aforesaid act in the respects stated in the complaint.

"The defendant is a subsidiary of the so-called Co-operative Grange League Federation Exchange, Inc. The last-mentioned corporation is one of the largest agricultural corporations in the United States. Through several subsidiaries, retailers and agents, it purchases, manufactures and sells large quantities of feed, and supplies seeds, fertilizer and necessary farm supplies for many thousands of farm patrons. The assets of the organization, over and above its capitalization, are the property of its patrons, and the parent corporation acts merely as the agent of the members. After the organization of the Co-operative Grange League Federation Exchange, Inc., in response to the desires of its members, the subsidiary defendant corporation was organized for the purpose of marketing for farmers, vegetables, fruits and other products of the farm including eggs. The quantity of eggs so marketed aggregates many thousands in number, and they are sold through the facilities of the defendant. The defendant, in a strict sense, does not buy eggs from its patrons, but acts as their agent in the sale. At the time of delivery to the defendant, the farmer is paid a certain amount as an advance on the eggs, and later, after its receipt from the sale and the deduction of operating costs, the overplus is paid back to the farmer in the form of a dividend. It appears from the moving papers that the defendant has been selling eggs to a railroad at prices applicable to the sale of eggs at retail.

"Considerable of the defendant's brief is directed to a statement of the nature and volume of the activities of the Co-operative Grange League Federation Exchange, Inc., including the defendant corporation, and to the denial of bad faith in the sales of the products in question here.

"The Co-operative Grange League Federation Exchange, Inc., has served the needs and enjoyed the confidence of hundreds of thousands of farmers over an extensive territory. There is nothing shown as a breach of good faith. If this were decisive of the matters here considered, it should be held that it has acted in the best of faith.

It appears that the Co-operative Grange League Federation Exchange, Inc., and its subsidiary, the defendant corporation, prior to bringing this suit, had voluntarily taken up with the Office of Price Administration consideration of the question of interpretation of the statutes involved in this suit and motion. It seems to me that this suit might well have been avoided by conferences between the parties in interest and some definite position arrived at. It does appear that shortly before this suit was brought defendant was advised that an investigation indicated an 'apparent' violation of the statute, and that following this, the defendant advised the plaintiff of its desire to discuss the matter and endeavor to work out an adjustment. Without any reply having been made to this offer, this suit was brought.

"However, irrespective of any question of bad faith, the right to an injunction must here be determined upon the construction of the Emergency Price Control Act of 1942, and the regulations adopted pursuant thereto.

"Two questions are involved in the motion. First, whether a railroad purchasing eggs for resale in its dining cars is a 'commercial' user as that word is used in Maximum Price Regulation No. 333, adopted pursuant to the Emergency Price Control Act of 1942, and can be charged prices applicable to sales 'to ultimate consumers except commercial, industrial, institutional or non-federal government users'; and second, whether the defendant should be enjoined from paying to its patrons a so-called 'patronage dividend' of 2½¢ per dozen in addition to the maximum price fixed by Maximum Price Regulation No. 333 and in paying consumer's grade price for uncandled or ungraded eggs.

"Section 1429.67 of Regulation No. 333, adopted pursuant to the Emergency Price Control Act, supra, purports to fix the maximum price covering sales of eggs to retailers and commercial and other users. Specifically it is titled 'Maximum prices for the sale of shell eggs to retailers and commercial, industrial, institutional and non-federal-governmental users,' and it fixes a detailed method of calculating the price, depending upon different grades, etc. Section 1429.68 of Regulation No. 333 covers sellers other than retailers to ultimate consumers. The heading of Section 1429.68, Regulation 333, reads: 'Maximum prices of shell eggs sold by farmers, wholesale distributors, retail route sellers, and all sellers other than retailers to ultimate consumers.' That section says the maximum prices 'for consumer grades of shell eggs sold and delivered by farmers *** or sellers other than retailers to ultimate consumers,' except commercial, industrial, institutional and non-federal-governmental users, shall be calculated by multiplying $1.17, the maximum price for the consumer grade of eggs, as provided by Section 1429.67 for sales to retailers. Price Regulation 333 does not cover sales of eggs by the retailer. See: Maximum Price Regulations No. 422 or No. 423. The section is intended to apply to sales made directly by the farmer producers

or a 'retail route seller' to the family user. This section excepts those groups to which Section 1429.67 applies. The two sections distinguish sales to retailers, commercial and other specific users from sales directly to the ultimate consumer. There is no specific definition of a 'commercial user' in the statute, nor is there any definition of who are 'industrial, institutional and non-federal-governmental users', nor of 'ultimate consumer.'

"The term or expressions are to be construed as having the ordinary meaning given to each. Within such meaning a railroad as here buying eggs from the defendant and selling them in its diners is a 'commercial user.' It occupies the same status as a restaurant, hotel, or bakery, and these clearly come within the meaning of 'commercial users.' Each purchases eggs in its trade or business, and this is in the nature of commerce or trade. As defined in Webster's New International Dictionary, 2d Ed. p. 538, commercial means: 'occupied with commerce; engaged in trade; *** relating to or dealing with commerce; *** of the nature of commerce; as, a commercial transaction; derived by commerce or trade; *** Having financial profit as the primary aim; *** Syn. Commercial *** suggests the larger aspects of the operations of exchange.' The ultimate consumer purchases eggs as and for his own food and not for profit, while the contrary is true as regards the railroad. Given such construction, a railroad is excluded as being an 'ultimate consumer.'

"Defendant's construction of the regulations, supra, would permit sales to practically every individual and every corporation, institutional and non-federal-governmental user purchasing in large quantities, at the same price a single dozen of eggs is sold to any consumer for his individual consumption. Such construction would practically eliminate any market for eggs for sale by the retailer to the small user - the housewife. It is obvious that the clear purpose of Regulation 333 was to fix maximum prices based on a differential between purchaser in large and small quantities. Such a basis is fundamentally necessary to effect the purpose of this law as related to commodities such as eggs.

"However oppressed we may seem to be by these and numerous other regulations adopted under the Emergency Price Control Act, if we are to have any price regulation, the regulations in question are consistent with the policy.

"Counsel for the defendant calls attention to the fact that Section 1429.65(q)(2) of Regulation No. 333, supra, defines a retailer but that nowhere is there any definition of a consumer which excludes railroad dining cars, hotels and restaurants. This lends no force to the claim that railroads, hotels and restaurants are consumers within the meaning of the act.

"Defendant cites the definition of 'consumer' as used in the Agriculture and Markets Law of the State of New York, Section 160-a, Consol. Laws N. Y. c. 69, and a decision in a New York court

(Grossman v. Hotel Astor, 166 Misc. 80, 1 N.Y.S. 2d 307, 310) in which the court held that a hotel was an ultimate consumer. The definition of 'consumer' as used in the New York statute has no bearing here since, as we believe, the sections of Price Regulation No. 333, supra, when read together, clearly show an intent to distinguish 'ultimate consumer' from users such as railroads, hotels and restaurants. For the reasons hereinbefore assigned, the Grossman case has no application. The court there applied the definition to an unusual state of facts, and it said: 'It seems to me, therefore, that in this instance, the "consumer" may well have been the defendant hotel *** .' In Ex parte Mehlman, 127 Tex. Cr. R. 257, 75 S.W. 2d 689, in effect did hold that hotels, restaurants and cafes came within the meaning of 'consumer', but this court is not disposed to follow this conclusion in view of what it is believed the intent of the Emergency Control Act was and the ordinary meaning of the word 'commercial.'

"It is urged that the defendant is entitled to pursue its present practices in the sales to railroads by virtue of the provisions of Section 2(h) of the Emergency Price Control Act of 1942. That section says that 'this section shall not be used *** to compel changes in business practices, cost practices or methods, ***", established in any industry.' If this contention has merit, the price-fixing regulation would be of little effect. Further, if these sales come within the meaning of 'business practices', the section especially provides that these shall not be used to 'prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.'

The plaintiff is entitled to an injunction pendente lite to restrain the sale of eggs to railroads at prices in excess of those permitted by the Maximum Price Regulation No. 333, Section 1429.67.

"It is admitted that the defendant has been paying its patrons so-called 'patrons dividends' after sales of the eggs by defendant. The dividend of $2\frac{1}{2}¢$ per dozen of eggs is paid in addition to the payment of the O. P. A. ceiling price for consumer grade eggs. This dividend is an arbitrary amount and is paid without regard to the corporation's earnings and without regard to whether the individual seller contributes to the company's earnings by any other sale. The payment of 'patronage dividends', defendant states, has been discontinued. Irrespective of such discontinuance, the court has the authority to grant an order enjoining further payment of these dividends. Section 205 and 205(a), Emergency Price Control Act. This court is of the view, however, that the exercise of this authority is discretionary, and it would be loath to grant an injunction here had the defendant declared that there will not be a recurrence of the violation. The defendant, however, says that it 'does not intend to resume this practice (paying patronage dividends) until sufficient current earnings have been accumulated to make necessary distribution of such earnings to current patrons.' This does not go far enough.

There still might be a violation through the payment of dividends, provided the ceiling prices were not observed. Therefore an injunction should be issued.

"The point that the defendant is paying consumer grade prices of uncandled and ungraded eggs was raised after the motion herein had been argued. The complaint itself is, however, sufficient to present proof of such purchases. The plaintiff submits an affidavit supporting its position in this respect, and the defendant has answered by affidavit. The government claims that the Maximum Price Regulation No. 333 sets up two types of ceiling prices prior to the retail level; in pursuance of Section 1429.65 (S) (1) (Regulation 333) section 1429.67 (Regulation 333) fixes ceiling prices for the 'consumer grade' type graded according to the standards set up by the U. S. Department of Agriculture in certain grades as presented in the publication entitled 'Tentative U. S. Standards and Weights for Wholesale Grades for Shell Eggs'; that these must be candled eggs and that Section 1429.67 a (Regulation 333) fixes the price for eggs which have not been candled or segregated and are not in the 'consumer quality grade' as specified by U. S. Department of Agriculture in the standards set up as aforesaid.

"Whether eggs meet approved standards can only be determined after they have been candled. It follows that the U. S. Government standards were intended to and do apply only to 'consumer grade' eggs, i.e. eggs which had been candled. Section 1429.67-a applies to wholesale grades for which a price of purchase was less than that fixed at the ceiling price of 1429.67. The lower price was fixed because the cost of candling was eliminated.

"The defendant says it takes Section 1429.65(s)(1) supra, when read in connection with the said U. S. Department of Standards, to mean that a 'consumer grade egg' is an egg which meets the standard, but that, as defendant uses the expression in support of its contention, it 'puts the cart before the horse,' for the eggs must first be candled before the standard can be applied. Regulation 333, as issued by the Office of Price Administration, includes a total of sixty finely printed pages. It is to be little wondered that confusion might arise in the construction of the meaning of some provisions.

"The defendant claims that it purchases its eggs from farmers as 'consumer grade eggs' and that it places on the farmer the burden of meeting the requirements set by the Department of Agriculture; that the farmer does the grading and receives pay for graded eggs 'which it is assumed meets the consumer grade standard.' It is further asserted that defendant makes a 'spot check' and in some cases a complete re-check of farmers' grading to make certain that the eggs are consumer grade. If the eggs purchased are candled there is no violation.

"An injunction may issue restraining defendant from purchasing 'uncandled' eggs at prices in excess of those fixed under Section 1429.67-a (Regulation 333)."

The basis on which the court concluded that the payment in the future of patronage dividends by the defendant might bring about a violation of ceiling prices is not given. This conclusion appears to be directly contrary to that reached by the court in the case of Bowles v. Inland Empire Dairy Association, 53 F. Supp. 210 (see Summary No. 21, page 1).

The matter of the payment of patronage dividends by marketing cooperatives is now covered by an order issued by the Office of Price Administration (see Summary No. 21, page 8).